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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71—

UNITED STATES OF AMERICA, APPELLANT

v.

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 18–23) is reported 332 F. Supp. 970.

JURISDICTION

The judgment (App. B, *infra*, p. 24) of the district court dismissing the government's complaint was entered on October 7, 1971. A notice of appeal to this Court was filed on December 3, 1971 (App. C, *infra*, p. 25). The jurisdiction of the Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

QUESTION PRESENTED

Whether the trial court applied an erroneous legal standard in holding that the acquisition by the fourth largest brewer in the United States of the largest brewer in New England did not violate Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
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> * * * * * * *

STATEMENT

The United States instituted this civil antitrust case, contending that the acquisition of the Narragansett Brewing Company ("Narragansett") by the Falstaff Brewing Corporation ("Falstaff") violated Section 7 of the Clayton Act (15 U.S.C. 18). It claimed that actual and potential competition in the New England beer market may be lessened by the

acquisition. After a trial on the merits, the district court rejected the contention of the United States and held that there was no Section 7 violation.

A. THE NEW ENGLAND BEER MARKET AND NARRAGANSETT

The beer industry in New England is concentrated.[1] In 1964 the eight largest sellers accounted for 81.2 percent of all beer sales in the New England market (GX 30);[2] and in 1965, the year of the acquisition, the four largest sellers accounted for 61.3 percent of all beer sales (computed from DX F). While barrel sales of beer in the area increased from 1960 to 1964 approximately 9.5 percent—from just under 5.5 million to more than 6 million barrels (computed from GX 1, O–Z)—the number of brewers operating plants in the region has declined. In 1957 eleven brewers operated plants in New England; in 1964, only six did (GX 1,

[1] The parties stipulated for the purposes of this case that the production and sale of beer was a line of commerce and that New England was a section of the country, within the meaning of Section 7 of the Clayton Act (GX 1, p. 2). In New England, as elsewhere in the United States, the production of beer is subject to the federal alcohol tax; however, entry into the market is not regulated by either the federal or state government.

[2] "GX" references are to government exhibits introduced in the district court; "DX" references are to defendant's exhibits introduced in the district court. "Tr." references are to the transcript of proceedings in the district court. Since the pages of the transcript volumes are not numbered consecutively through the volumes, references are to the date of each volume. For example, "Tr. 07" refers to the transcript volume of October 7, 1970.

p. 4).[3] Seven of the nation's ten largest brewers sold beer in New England in 1965,[4] although not all seven operated plants there.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition by Falstaff (App. A, *infra*, p. 20). With 1964 sales of 1,275,000 barrels, it accounted for approximately 20 percent of all beer sold in New England (GX 1, M; App. A, *infra*, p. 20). The company operated a modern and efficient plant in Cranston, Rhode Island, with an annual production capacity of 1.5 million barrels (GX 5, p. 17; DX A, p. 11). Between 1960 and 1964, Narragansett's net sales increased from $17.2 million to $25.2 million, and its net income increased from $417,284 to $713,083 (GX 5, p. 10). The company had a good distribution system, built upon contracts with wholesale distributors; as was the general practice in the New England beer business, these contracts were not exclusive and distributors frequently handled more than one company's beer. Narragansett from time to time switched distributors (App. A, *infra*, pp. 20–21; Tr. 014, 23–24).

[3] Three small brewers still operated in New England in 1964: Hull Brewing Co. in Connecticut, and Diamond Spring Brewery and Dawson's Brewery in Massachusetts (GX 1, pp. 3–4). Diamond Spring and Dawson's, however, were interested in being acquired by a larger brewer and suggested such acquisition to Falstaff (Tr. 013, 19–20).

[4] Those seven were Anheuser-Busch, Schlitz, Pabst, Carling, Schaefer, Ballantine, and Miller; the other three which did not sell in New England were Falstaff, Hamm, and Coors (GX 1, M; DX G and H).

B. FALSTAFF—THE ACQUIRING CORPORATION

At the time of the acquisition Falstaff, the acquiring firm, was the fourth largest producer of beer in the United States (DX F, p. 8). Its 1964 production was 5.8 million barrels, or 5.8 percent of the nation's production (GX 5, p. 16). Starting in 1933 with a 100,000 barrel plant in St. Louis, Missouri, the company grew steadily by acquiring and expanding weak or failing breweries (GX 2, pp. 6–10; Tr. 013, 19). Between 1955 and 1964 its net sales increased from $77 million to $139.5 million, and its net income increased from $4.3 million to $7 million (GX 3F, C). As of January 1965, the company operated eight plants.[5] Falstaff had been able to finance all of its expansion projects on the basis of a good credit rating. And in 1964 the company planned a ten-year $35 million program to expand its existing plants, apart from any acquisitions it might make (Tr. 06, 57; Tr. 07, 116, 105).

Falstaff marketed its beer mainly through distributors. It had built a strong distributorship system by stimulating public demand for its beer through extensive and effective advertising and by providing distributors with a quality product at a price which allowed a good markup (GX 3B, p. 8; GX 3F, pp. 10–12). While Falstaff did not sell beer in the northeastern United States, it did sell in thirty-two mid-

[5] Subsequent to the filing of this suit, Falstaff closed one of its breweries, and thus at the time of trial it operated seven plants (Tr. 013, 67–70).

western, western and southern states, sixteen of which it entered after 1950 (GX 2, p. 11; pp. 6–10).

Although Falstaff prospered in the decade prior to the acquisition, it encountered increasingly stiff competition during the 1960s from the "national brewers"[4] (GX 5, p. 2; Tr. 06, 126; Tr. 09, 8–9)—*i.e.*, the brewers selling their products in all the significant markets in the country (Tr. 07, 57). National brewers possess important competitive advantages in that their beers have greater prestige than regional beers, and they are able to advertise on a nation-wide basis (Tr. 06, 127–128).[5] These advantages were exploited during the 1960s, resulting in large increases in sales by the nationals and more vigorous competition for regional brewers such as Falstaff (Tr. 06, 125; Tr. 09, 8–9; GX 5, p. 2).

Recognizing the advantages of national marketing status and the fact that no brewer could justly call itself national until it sold in the densely populated Northeast (Tr. 07, 57, 102), Falstaff determined to enter the northeast beer market.[6] After unsuccessful

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[4] The four "national brewers" are: Anheuser-Busch, Schlitz, Pabst, and Miller (Tr. 06, 41).

[5] National brewers also have the advantages of being less susceptible to bad weather or labor difficulties in any particular region (Tr. 128–129).

[6] Falstaff's president testified that the company had for some time wanted to enter New England as part of its interest in becoming a national brewer (Tr. 09, 102; see also Tr. 07, 18–19). As early as 1960, the management consulting firm of Arthur D. Little, in a comprehensive study commissioned by Falstaff, recommended that Falstaff enter the populous Northeast within five years by building a brewery (GX 10, pp. 5, 14, 46–47).

efforts between 1962 and 1964 to acquire two large brewers located in the New York City area,* Falstaff acquired Narragansett in 1965.

The other two large regional brewers not already in New England— Hamm and Coors, ranking eighth and ninth in national sales (GX 1, M)—were geographically remote from New England. Hamm's nearest plant to New England is in St. Paul, Minnesota, some 1,385 miles from Boston and Coors' only plant is in Golden, Colorado, some 2,000 miles from Boston (GX 1, 4).

C. THE PROCEEDINGS BELOW

On May 26, 1965 Falstaff agreed to acquire Narragansett for about $19 million. Before the acquisition was consummated, however, the United States filed suit against Falstaff and Narragansett, alleging that the acquisition violated Section 7 of the Clayton Act by eliminating potential competition between the two brewers in the production and sale of

*In 1962 and 1963 Falstaff attempted to acquire Liebmann Breweries, a large New York City brewer that in those years was ninth and tenth in national sales (GX 22; GX 1, K and L). After those efforts failed, Falstaff unsuccessfully attempted in 1963 and 1964 to acquire P. Ballantine, of Newark, New Jersey, a brewer that in those years was sixth and seventh in national sales (GX 28; GX 29; GX 1, L and M).

During those years, Falstaff kept files of letters from distributors and potential distributors in New England who were interested in handling Falstaff beer should the company enter the New England market (GX 9).

beer.[10] The district court denied the government's motions for a temporary restraining order and a preliminary injunction, which accompanied the complaint, and on July 15, 1965 the acquisition was completed. Shortly thereafter, the court dismissed the complaint as to defendant Narragansett. Falstaff agreed to operate Narragansett as a separate wholly-owned subsidiary until otherwise ordered or permitted by the court.

Following a trial on the merits, the district court held that the government had failed to prove that Falstaff was a potential entrant into the New England beer market (App. A, *infra*, p. 23). Rather, the court found that "the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter [the New England] market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett" (App. A, *infra*, p. 22). The court pointed out that the Falstaff executives had considered all the alternative means of entry, but that the management had determined that none of these would be reasonably profitable (App. A, *infra*, pp. 22–23). The court also found that both before and after the acquisition, there had been vigorous competition in the

[10] The complaint also charged that the acquisition violated Section 7 by substantially lessening potential competition in the production and sale of beer generally and by increasing industry-wide concentration in the production and sale of beer. After the parties stipulated on December 23, 1969 that the line of commerce was the sale and production of beer and that the section of the country was New England, the United States did not press these additonal charges.

New England beer market (App. A, *infra*, p. 21) and that, since the acquisition, Narragansett's share of the market had declined while the market shares of Anheuser-Busch and Schlitz had increased (App. A, *infra*, p. 21).

On this basis, the court concluded that it was "not probable" that Falstaff's acquisition of Narragansett may substantially lessen competition in the New England beer market (App. A, *infra*, p. 23).[11]

THE QUESTION IS SUBSTANTIAL

This merger case involves the criteria for determining whether the acquiring company is a substantial potential competitor.[12] The district court relied exclusively upon its evaluation of the subjective intent of the management of the acquiring company. In our view, that standard would seriously undermine the effectiveness of Section 7 of the Clayton Act in preserving competition in the beer and other industries. Cf. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

1. Section 7 of the Clayton Act proscribes acquisitions which eliminate significant potential competition, because potential competition is important to the preservation of actual competition in concentrated markets. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *Penn-Olin*

[11] The court added that in any event the acquisition was procompetitive because it would enable Narragansett to compete more successfully in New England against the national brewers (App. A, *infra*, p. 23).

[12] A case presenting similar questions in the context of the regulated banking industry is presently before the Court. *United States* v. *The First National Bancorporation, et al.*, No. 71–703.

Chemical Co., 378 U.S. 158. Where a concentrated market is so structured that only a limited number of firms on the edge of that market have the ability and incentive to enter, those firms are competitively significant both because they may deconcentrate the market by future independent entry, and because the possibility of entry by established firms is an external factor influencing the conduct of the firms already in the market. *Ibid.*

The preservation of potential competition is particularly important in the beer industry. Because barriers to entry by new firms are increasing and the industry is becoming highly concentrated, "[t]he most promising source of new competition is that of the established brewer moving into a new geographic market."[13] It is impossible to preserve significant potential competition, however, unless those firms which are significant potential competitors can be accurately and reliably identified. This determination, which obviously can never achieve litmus test certainty, depends upon a careful analysis of objective economic evidence, directed toward the potential entrant's financial capability, its economic incentive and the reasonable prospects of success. That subjective evidence should not play a significant part in identifying potential competitors follows from a number of factors.

First, this court has never required subjective evidence in potential competition cases. Thus, in *United*

[13] Elzinga, *The Beer Industry*, in Adams, *The Structure of American Industry*, 189, 202 (4th ed., 1971).

States v. *Penn-Olin Co.*, 378 U.S. 158, 175, the Court fully reviewed the objective evidence of the capability and incentive of joint venturers to enter a market independently, and concluded: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581.

More importantly, examination of the subjective motives and intent of corporate management as to alternatives they might or might not have pursued with respect to a given market frequently compels a court to make a judgment of economic probabilities on what is bound to be self-serving testimony. Moreover, such an inquiry involves highly speculative judgments. Businessmen are often unable to predict in retrospect what they would have done had they not been able to make the acquisition which they in fact made.[14] Since, realistically, executives probably do not, when considering an acquisition, face

[14] In another Section 7 case, for example, officials of Bethlehem Steel strongly insisted that unless Bethlehem were allowed to acquire Youngstown Steel, the company would never enter the midwest steel market. The district court ruled against the merger. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.). Nonetheless, Bethlehem entered the market independently. See Moody's *Industrial Manual*, June 1966, p. 2861. Nor is the *Bethlehem* case unique: see *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), affirmed, 320 F.2d 509 (C.A. 3).

the critical question of whether they would enter the market independently if they could not make the acquisition, their generalized testimony that they would not have entered except through acquisition does not shed much light on whether their firm was a potential entrant.

There is another reason why subjective evidence should be discounted in potential competition cases. As we have noted, the existence of a firm which might enter a given market is a factor influencing the conduct of firms already in that market. Since the firms in the market may well be aware of objective factors such as the outside firm's financial capacity and economic incentive to enter the market but will probably not be privy to management's thinking on whether and how to effect entry, the outside firm's impact on conduct within the market will turn on the objective factors.

In short, were subjective evidence a significant factor in the appraisal of potential entry, identification of potential competitors would be grounded on unreliable, and to some extent irrelevant, indicators. The antitrust consequences of any acquisition would be largely unpredictable both to the businessmen and to the government. By contrast, a test of potential entry that relies essentially on objective evidence of the attractiveness of the market and the firm's capability and incentive to enter it provides district courts with a means of analysis that will give greater certainty and reliability to their decisions.

2. In this case, the district court not only gave significant weight to subjective evidence, but based its judgment solely on its determination that Falstaff's management did not intend to enter the New England market by any means other than acquisition of a market leader. In so doing, the court ignored the extensive evidence which the United States presented showing the concentrated structure of the New England beer market, the relatively few potential entrants in that market, Falstaff's position as one of these few, and its substantial incentives and abilities to enter *de novo* or by a toehold acquisition.

At the time of the acquisition, Narragansett was the leading seller of beer in New England, accounting for 20 percent of the market. It was financially healthy, had experienced good growth, and was a strong and viable competitor whose survival did not depend on acquisition by a larger firm. Falstaff, in turn, had every reason to enter New England independently in order to achieve its desired goal of becoming a national brewer—a goal which recognized the economic fact that national brewers had substantial competitive advantages over regional brewers (Tr. 06, 125–126; Tr. 08, 103).

Falstaff could have entered the New England market *de novo*. In 1959 it commissioned the management consulting firm of Arthur D. Little to study its entire business. The Little study, delivered to Falstaff in 1960, recommended that Falstaff enter the northeast market, including the Middle Atlantic States, by building a brewery near Baltimore (GX 10, 15–16,

107–108). Although Falstaff accepted several of Little's other suggestions for expansion, it apparently rejected, in favor of entry by acquisition, the recommendation to build a brewery in the Northeast (GX 10, 41; Tr. 06, 82, 85–88). It made this decision even though the Little study had warned that entry by acquisition would prove more costly (GX 10, 108).[14]

Falstaff might also have entered the New England market by a "toehold entry"—buying a small brewery and expanding it.[15] Falstaff's development shows a history of expansion through acquisition of small, failing breweries, which it thereafter enlarged and modernized (GX 2, 2–6). Breweries existed in New England which, if acquired, could have provided a base for such operations—Hull Brewing Co. in New Haven, Connecticut, with a capacity of 100,000 bar-

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[14] From the frequent expansion of plants it had purchased, Falstaff was thoroughly familiar with the technology and construction of breweries. A New England plant would, to be compatible with efficient operation, require a capacity of at lease one million barrels (Tr. 013, 69; Tr. 014, 9; GX 10, 107). Falstaff's economist estimated that the cost of building such a facility would be about twenty million dollars, just over the price paid by Falstaff for Narragansett (Tr. 08, 116). Even if a new plant had cost more, there is little doubt that Falstaff could have financed it. The company was financially healthy and had obtained financing for all its projects in the past (Tr. 06, 57). Indeed, in 1964 the company planned a ten-year $35 million program to expand its existing plants; Falstaff's vice-president for finance remained confident that Falstaff could at the same time raise $35,000,000 more, if necessary, to acquire Ballantine (Tr. 07, 116, 105) (see n 9, *supra*).

[15] See *The Bendix* Corp. (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corp.* v. *Federal Trade Commission*, (C.A. 6, No. 20,687, October 18, 1971).

rels, Diamond Spring Brewery in Lawrence, Massachusetts, with a capacity of 100,000 barrels, and Dawson's Brewery in New Bedford, Massachusetts, with a capacity of 750,000 barrels (GX 1, 3–4). Both Diamond Spring and Dawson's had made overtures to Falstaff inviting acquisition (Tr. 013, 19–20).[17] Falstaff could have obtained the financing to acquire and expand a small brewery (Tr. 07, 105; Tr. 06, 57).

In addition, Falstaff has had extensive experience in the building and maintenance of distributor organizations and could have developed a strong system in New England had it entered the market other than by acquiring Narragansett. According to Falstaff's president, to achieve an effective wholesale distribution system in New England, a new entrant had to offer distributors a company marketing plan backed by sufficient advertising expenditures to promote the product to the buying public, a wholesale price permitting a profitable mark-up and a product with a good reputation (Tr. 06, 45). Falstaff could have provided these three elements. It is not surprising therefore, that between 1960 and 1964 it had received numerous unsolicited letters of inquiry from beer

[17] Two of these plants were small; but so were almost all of Falstaff's plants at the time of acquisition. For example, Falstaff entered the California market by acquisition in 1952 of the Pacific Brewing & Malting Co., which had a capacity of only 200,000 barrels (GX 2, 4). While Diamond Spring and Dawson's may not have been prosperous in the 1960s, Falstaff's president testified that Narragansett was the first brewery acquired by Falstaff that at the time of acquisition was not "dying or dead" (Tr. 013, 19).

distributors in New England who wished to handle Falstaff (GX 9). Many other distributors were potentially available to handle a well advertised brand which could return them a good profit, because in New England distributors do not have exclusive distributorship contracts (Tr. 014, 23–25).

In our view, the district court employed an erroneous standard in concluding that Falstaff was not a potential entrant into the New England beer market other than through acquisition of Narragansett.[18] The court relied wholly on evidence of management's stated intent and made no attempt to analyze the detailed objective evidence establishing Falstaff's financial capacity and economic incentive to enter the market either *de novo* or by toehold acquisition.[19]

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[18] The district court also failed to make the detailed findings required by F.R. Civ. P. 52(a) and this court's decisions. Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.

[19] The district court's conclusion that the acquisition was procompetitive because it would enable Narragansett to compete more successfully with the national brewers is not only without support in the record, but also does not validate the acquisition. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370–371; cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374–375.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

District Court of the United States for the District of Rhode Island

(Civil Action No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF

v.

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

OPINION

October 7, 1971

DAY, *District Judge.* This is an action brought by the United States pursuant to the provisions of Section 15 of the Clayton Act, 15 U.S.C. § 25, for declaratory and injunctive relief to enjoin the proposed acquisition by Falstaff Brewing Corporation (Falstaff) of all the assets of Narragansett Brewing Company (Narragansett) on the ground that the effect of the proposed acquisition may be substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] As appears from the allegations of

[1] Section 7 reads in pertinent part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation

the Government's complaint and the evidence presented during the trial of this action, Falstaff and Narragansett, on May 26, 1965, had executed an "Agreement Pursuant To Plan Of Complete Liquidation" under the provisions of which Falstaff would acquire all the assets and assume the debts and liabilities of Narragansett on July 15, 1965.

The instant action was filed on July 13, 1965. In its complaint the Government sought a temporary restraining order and a preliminary injunction enjoining the defendants from consummating said acquisition agreement. I declined to grant said temporary restraining order and after a hearing on July 14, 1965, denied the Government's prayer for a preliminary injunction against Narragansett. At that time service of process had not been made upon Falstaff. On July 15, 1965, Falstaff acquired the assets and assumed the debts and liabilities of Narragansett. Service of process was made on Falstaff on July 21, 1965, at St. Louis, Missouri, where its principal place of business was located.

Subsequently Narragansett's motion to dismiss this action as to it was granted and Falstaff agreed to maintain Narragansett as a separate wholly-owned subsidiary until otherwise ordered or permitted by this Court. Extensive pre-trial discovery was then conducted by the parties. Finally, on May 18, 1970, an

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engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

order was entered by this Court that all said discovery should be completed not later than June 30, 1970.

Trial upon the plaintiff's prayer that Falstaff be required to divest itself of Narragansett began on October 6, 1970, and was concluded on October 15, 1970. At the conclusion thereof I reserved decision pending the filing of briefs by counsel for the parties and the preparation of the transcript of the evidence presented during the trial. These briefs were subsequently filed and have been carefully considered by me.

The Government contends that Falstaff's acquisition of all the assets of Narragansett violates the provisions of said Section 7 of the Clayton Act because it will substantially lessen competition in the New England beer market, so-called, by eliminating the potential competition that would have been created and would have existed if Falstaff entered said market independently. It further contends that at the time of said acquisition Falstaff was a potential entrant into said market. Falstaff denies that it was a potential entrant into said market and denies that it would have entered said market except by acquiring Narragansett, which had an established, strong and viable distribution system that would assure an adequate distribution of its brand of beer.

The evidence adduced at trial establishes the following facts. Said New England beer market comprises the six New England states. Said beer market at the time of said acquisition was a highly competitive market. Narragansett was then the largest seller of beer in said market with approximately twenty (20) per cent of the sales therein. It had a strong, viable distribu-

tion system. Falstaff had its principal brewery in St. Louis, Missouri, and owned several smaller breweries elsewhere, of which the nearest to New England was located in Fort Wayne, Indiana. Falstaff was not a national brewer but was desirous of eventually attaining national status by penetrating the northeastern metropolitan market. The evidence also establishes that its management was firmly committed against attempting to penetrate said northeastern metropolitan market until it could obtain a strong, viable distributor organization therein.

The opportunity to secure such a distributor organization in New England was presented in 1964 when the Haffenreffer family, the owners of Narragansett, motivated by increasing competitive pressure from national brewers in the New England beer market and the desire to lend diversity and security to their personal estates, contacted officers of Falstaff with the view of selling its assets to Falstaff. As hereinbefore recited, the evidence establishes beyond doubt that the New England beer market was then characterized by intense, vigorous competition. The evidence further establishes that since Falstaff's acquisition of Narragansett on July 15, 1965, there has been no diminution of the intensity and vigor of said competition. It further establishes that Narragansett's share of the New England beer market had been reduced from 21.5% in 1964 to 15.5% in 1969, while the combined shares of the two leading national brewers (Anheuser-Busch and Schlitz) in said market had increased from 16.5% to 35.8%.

It is well settled that post acquisition evidence is admissible in an action such as this and may properly be considered in determining whether the probable effect of said merger will be a substantial lessening of competition in said New England beer market. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); F.T.C. v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. du Pont & Co., 353 U.S. 586 (1957). In this case there is no evidence that Falstaff during said period did not make every effort to realize the benefits it hoped to obtain by the acquisition of Narragansett.

The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acquisition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its existing breweries, the nearest of which was located in Ft. Wayne, Indiana, (3) the building of a new brewery on the east coast and other possible alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said

New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein.

I also find that the Government has failed to establish by a fair preponderance of the evidence that said acquisition by Falstaff will probably result in a substantial lessening of competition in the New England beer market. Section 7 of said Clayton Act is concerned with probabilities, not mere possibilities. Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962). It is my considered opinion that said acquisition by Falstaff will serve to improve the competitive position of the Narragansett brand of beer in the New England beer market which is intensively competitive, and enable it to compete successfully with the brands of large, national breweries which dominate said market.

Finding, as I do, that it is not probable that said acquisition of Narragansett by the defendant Falstaff may substantially lessen competition in said New England beer market, judgment must be and will be entered in favor of the defendant Falstaff Brewing Corporation.

(s) EDWARD W. DAY,
District Judge.

APPENDIX B

District Court of the United States District of Rhode Island

(C.A. No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF

v.

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

JUDGMENT

This action came on for trial before the court sitting without jury and the issues having been duly tried and the court having filed its opinion, dated October 7, 1971, directing that judgment must be entered in favor of the defendant, Falstaff Brewing Corporation, it is ORDERED and ADJUDGED:

That the complaint herein be and the same is hereby dismissed.

Dated: October 7, 1971.

Approved:

EDWARD W. DAY,

United States District Judge, October 7, 1971.

APPENDIX C

In the United States District Court for the District of Rhode Island

(Civil Action No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered October 7, 1971, dismissing the complaint in this action.

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FILED DECEMBER 3, 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1972